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In The
Supreme Court Of The United States
OCTOBER TERM, 1953

No. 554

WILLIAM V. STEPP, SR.
Administrator of the Estate
of William V. Stepp, Jr., Deceased,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, William V. Stepp, Sr., Administrator of the Estate of William V. Stepp, Jr., Deceased, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the Eastern District of Virginia, Norfolk Division.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is printed in the record (R.). The opinion of the Court of Appeals is reported in F. 2d .

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is invoked under 28 U.S.C., Sec. 1254(1). The judgment of the Court of Appeals sought to be reviewed was entered November 9, 1953.

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether an exception of assault and battery to the Federal Tort Claims Act, 28 U.S.C., Sec. 2680(h), for the death of a civilian shot in Alaska by a sentry on duty with the United States Army, is to be interpreted under Alaska law or under the general law.

2. Whether the shooting of a civilian in Alaska by a sentry, admittedly a poor marksman with a 45-caliber gun, who was instructed by his superiors to use his gun in case of "necessity" without "necessity" being defined, who did not aim the gun, firing two shots in the general direction of the civilian, constituted negligence or an assault and battery.

3. Whether the United States Government, whose answer admitted jurisdiction under the Federal Tort Claims Act, 28 U.S.C., Sec. 1346(b), waived the affirmative defense of assault and battery by waiting approximately two and one-half years subsequent to the filing of its answer, and about

eleven months after taking its evidence, and the day following the trial before filing an amended answer setting forth the defense of assault and battery.

STATUTE INVOLVED

Federal Tort Claims Act, 28 U.S.C., Sec. 1346(b) and Sec. 2680(h).

STATEMENT OF THE MATTER INVOLVED

William V. Stepp, Jr., a twenty-six year old civilian attached to the United States Army Transport Service, was killed on June 4, 1948, at Anchorage, Alaska, from two bullets fired by Donald E. Cotham, a sentry on duty with the United States Army.

Stepp was returning to his ship, a LST tied up at a dock. Stepp had no weapons upon him. He approached the sentry hut where Cotham was on duty. Cotham was armed with a 45-caliber gun and a night stick. (T. p. 82). He identified himself as a member of the crew of the LST. Cotham found his name on the list. (T. pp. 49, 83). Stepp was carrying a package. Cotham asked him what was in the package. Stepp said the package contained laundry. (T. p. 16). Cotham had no idea what the package contained, but suspected liquor. (T. p. 18). The telephone in the sentry hut rang and Cotham answered the phone. (T. p. 49).

Stepp began to run towards the dock. (T. pp. 17, 50). Cotham pursued Stepp, who, at first, was about 300 feet away. (T. p. 82). He ordered Stepp to halt. (T. p. 51). Cotham gained on Stepp, closing the distance to about seventy-five feet. Cotham fell. (T. p. 82). He got up, ran after Stepp and narrowed the distance to about forty-five

feet. Cotham fired two shots in the ground. (T. p. 17). He then fired two shots in the general direction of Stepp. He did not aim the gun, nor did he attempt to find the sight and place the sight on the fleeing Stepp. Cotham's intention in firing the gun was to stop Stepp and to warn him. Cotham could not remember whether he intended to hit Stepp. (T. p. 54).

Cotham had been instructed by Sgt. Steinhall, Sergeant of the Guard, to use the gun if "necessity arose". (T. p. 56). He had never been instructed what constituted "necessity". (R.). "Necessity" never had been defined nor specified and was not clear to him. (T. pp. 15, 38).

Cotham was 17 years old. He had enlisted illegally at the age of 15 and had had 6 or 7 weeks of basic training before being mustered out of the Army. (T. p. 32). At the age of 17 he re-enlisted in the Army and was sent to the Combat Military Police Battalion, Anchorage, Alaska. There he had six weeks of training, (T. p. 35), but had not completed the course. (T. p. 35).

Cotham was a poor shot with the Army 45-caliber gun. (T. p. 66). He had been taught that the 45-caliber gun was a very dangerous weapon. He had been taught that the 45-caliber gun is accurate only at very close range. (T. p. 59).

Cotham had received special orders not to allow liquor on the dock and to require proper identification from people going upon the dock. He was instructed to be more rigid in enforcing the regulations. (T. p. 6).

The shooting occurred around 2:00 A.M. It was light, but not too light. (T. p. 19).

Stepp was survived by his father, William V. Stepp, Sr., his sister, Mrs. Warren Lamb, and his stepmother, Virginia A. Stepp. At the time of his death Stepp was earning about $2,300.00 a year plus subsistence.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The United States Court of Appeals for the Fourth Circuit has decided an important question of Federal law which has not been, but should be settled by this Court, namely, the construction of the exception of assault and battery to the Federal Tort Claims Act, 28 U.S.C., Sec. 2680(h).

2. The decision below is in conflict with the decision of the United States District Court for the Northern District of California, Southern Division, in *Cerri* v. *United States,* 80 F. Supp. 831, holding the Government liable for injuries resulting from shots fired by a sentry while attempting to halt a civilian.

3. The decision below is in conflict with the decision of the Seventh Circuit in *Stewart* v. *United States,* 7th Cir., 199 F. 2d. 517, holding that an exception to the Federal Tort Claims Act is available to the Government only when aptly pleaded and proven, and can be waived by the Government.

Wherefore, petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Court of Appeals for the Fourth Circuit commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record below, and that the decision of said Court of Appeals be reversed and that petitioner have such other and further relief as may be just.

LOUIS B. FINE
Counsel

BRIEF IN SUPPORT OF PETITION

POINT I

The United States Court of Appeals for the Fourth Circuit has decided an important question of Federal law which has not been, but should be settled by this Court, namely, the construction of the exception of assault and battery to the Federal Tort Claims Act, 28 U.S.C., Sec. 2680(h).

The Court of Appeals for the Fourth Circuit in its decision below held "that where the United States excepts itself from certain liabilities, as in Section 2680 of the Federal Tort Claims Act, such exceptions must be interpreted under the general law rather than under some peculiar interpretation of a State or Territory."

The pertinent provisions of the Federal Tort Claims Act, 28 U.S.C.A., Sections 1346(b), 2671-2680, are as follows:

> "Section 1346(b). Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for . . . death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
>
> "Section 2674. Liability of United States. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ."

"Section 2671. Definitions. As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'employee of the Government' includes . . . members of the military or naval forces of the United States . . ."

" 'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Section 2680(h) excludes "any claim arising out of assault, battery," etc.

The law of Alaska applies as to matters of substantive law. Section 1346(b) of the Act, quoted above, provides that the United States shall be liable if a private person would be liable under the circumstances "in accordance with the law of the place where the act or omission occurred." In *State of Maryland* v. *United States,* 4th Cir., 165 F. (2d) 869, it was held that local law determines whether an actionable negligent or wrongful act was committed and the nature and extent of recovery.

Alaska Compiled Laws Annotated, 1949, section 61-7-3, states that in an action for death, the personal representative of a decedent may bring action against one whose wrongful act or omission caused decedent's death. Damages are limited to $15,000.00, and the recovery, less expenses of the action, inures to the exclusive benefit of the widow, surviving husband and children of decedent, or, if there are none such, is administered as personal estate of the decedent.

In *Copper River and N. W. Railway Co.* v. *Phillips,* 9th Cir., 3 Alaska Federal Reports 841, 196 F. 328, a railway company was held liable for damages for injuries sustained

by the plaintiff who was shot by an employee of the railway company while acting in the course of employment.

Under the law of Alaska, killing is not justifiable and not excusable to arrest or attempt to arrest a person who has not committed a felony. Section 65-4-9, Alaska Compiled Laws Annotated, 1949, states four instances, none of which is applicable in the case at bar, where homicide is justifiable by a public officer:

> "That the killing of a human being is justifiable, when committed by public officers or those acting in their aid and assistance and by their command, either—
>
> "First. In obedience to the judgment of a competent court;
>
> "Second. When necessarily committed in overcoming resistance to the execution of legal process or to the discharge of a legal duty;
>
> "Third. When necessarily committed in retaking persons charged with or convicted of crime who have escaped or been rescued; or
>
> "Fourth. When necessarily committed in arresting a person fleeing from justice who has committed a felony."

Section 65-4-10, Alaska Compiled Laws Annotated, 1949, states three instances, none of which is applicable in the case at bar, where homicide is justifiable by a person not an officer:

> "First. To prevent the commission of a felony upon such person, or upon his or her husband, wife, parent, child, master, mistress, or servant;
>
> "Second. To prevent the commission of a felony upon the property of such person, or upon property in

his possession, or upon or in any dwelling house where such person may be;

"Third. In the attempt, by lawful ways and means, to arrest a person who has committed a felony or in the lawful attempt to suppress a riot or preserve the peace."

Section 65-4-11, Alaska Compiled Laws Annotated, 1949, gives two instances, none of which is applicable in the case at bar, where the killing of a human being is excusable when committed:

"First. By accident or misfortune in lawfully correcting a child, or in doing any other lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent; or,

"Second. By accident or misfortune in the heat of passion, upon a sudden and sufficient provocation, or upon a sudden combat, without premeditation or undue advantage being taken, and without any dangerous weapon, or thing being used, and not done in a cruel or unusual manner."

In the case at bar, the sentry was suspicious of the package which Stepp was carrying. Stepp told him the package contained laundry. The sentry pursued Stepp because he thought Stepp was carrying liquor. The sentry knew Stepp was a member of the crew of the LST moored to the dock. It is doubtful if Stepp committed any crime. He certainly committed no felony. The sentry was not justified in shooting Stepp. His act in so doing was a wrongful act and constituted negligence as a matter of law.

In *Maggi* v. *Pompa,* 9th Cir., 105 Cal. App. 496, 287 P. 982, the court said:

"On the evening of October 31, 1925, while patrolling the beat assigned to him, Cesena attempted to place under arrest one Semenza on a charge of disturbing the peace. Semenza resisted arrest, a fight ensued, during which Cesena drew his gun and shot at Semenza. Semenza ran and Cesena took two other shots at him, one of which struck the plaintiff, who was an innocent bystander, causing the injuries which are the subject of the complaint.

"On this appeal respondent's whole case rests upon the doctrine of respondeat superior. If the full relation of master and servant existed between Cesena and Appellant at the time of the occurrence, then the Appellant would be liable to the respondent for the injuries sustained by him because it is conceded that in attempting to make an arrest for a mere misdemeaner Cesena was not authorized to shoot at the offender and his act in so doing was therefore, negligent."

In the case at bar the Government was negligent in the following particulars, each a proximate cause of Stepp's death:

1. In posting a sentry who had limited experience in the use of a 45-caliber gun.

2. In instructing the sentry to use the gun in case of "necessity", without defining what constituted "necessity".

3. In shooting the civilian when the civilian had no weapon upon him and had committed no felony.

4. In shooting in the general direction of the civilian when the sentry knew he was a poor shot with the gun.

5. In shooting the civilian when the sentry had closed the distance from 300 feet to 45 feet and could have overcome him, if necessary to use force, with a night stick.

6. In failing to exercise reasonable care to avoid hitting the civilian, as the sentry could have lined up the civilian in his sights and avoided hitting him.

Alaska Compiled Laws Annotated, 1949, Vol. 3, Title 65, Ch. 4, sets forth the crimes of assault and assault and battery, and assault with a dangerous weapon, as follows:

> "Section 65-4-23. Assault and assault and battery. That whoever, not being armed with a dangerous weapon, unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another, shall be fined not more than five hundred dollars or imprisoned in the county jail not more than six months, or both."
>
> "Section 65-4-22. Assault with dangerous weapon. That whoever, being armed with a dangerous weapon, shall assault another with such weapon, shall be punished by imprisonment in the penitentiary not more than ten years nor less than six months, or by imprisonment in the county jail not more than one year nor less than one month, or by fine not less than one hundred dollars nor more than one thousand dollars."

Under the law of Alaska an assault with a dangerous weapon cannot be a simple assault or a simple assault and battery. In *Hickey* v. *United States,* 9th Cir., 3 Alaska Federal Reports 297, 168 F. 536, the trial court refused to instruct the jury that they might find one of four verdicts, namely, assault with a dangerous weapon, assault and battery, simple assault, or not guilty. The Court said:

> "It is very apparent, however, from the testimony, that defendant was either guilty of the offense charged or was not guilty at all. There is not the slightest doubt

> that he assaulted Powell with a revolver, using it as a club. Indeed, he admits this himself. That such an instrument, so used, is a dangerous weapon, no one will question. So that, the assault being established, there was but one defense, namely, that the defendant was justifiable in making it. If justifiable, he was not guilty; but, whether guilty or not guilty was a question for the jury. There was no room, therefore, for the jury to find the defendant guilty of a lesser offense than assault with a dangerous weapon, and the court rightly refused to submit the question to them."

In *Johnston* v. *U. S.*, 9th Cir., 154 F. 445, the court held as proper an instruction that if the jury should find that a revolver was a dangerous weapon under the circumstances of its use at the time they would not be justified in rendering a verdict of simple assault.

In the case at bar Cotham admitted that the 45-caliber gun was a dangerous weapon. In view of section 65-4-23 of Alaska Compiled Laws Annotated, defining simple assault and simple assault and battery as "whoever, not being armed with a dangerous weapon, unlawfully assaults" etc., Cotham could not have committed an "assault, battery" within the Federal Tort Claims Act, 28 U.S.C.A., sec. 2680(h), which excludes "any claim arising out of assault, battery," etc. To be necessarily included in the greater offense of assault with a dangerous weapon the lesser crime of simple assault and simple assault and battery must be such that it is impossible to commit the greater without first having committed the lesser crime. See *Giles* v. *United States*, 9th Cir., 144 Fed. (2d) 860. It is submitted that 28 U.S.C.A. sec. 2680(h) does not prohibit a claim against the United States under the facts in the case at bar.

Two other statutes are relevant, to-wit: Negligent Homicide and Careless Use of Firearms:

> "Section 65-4-8. Negligent Homicide. That every killing of a human being by the culpable negligence of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable, shall be deemed manslaughter, and shall be punished accordingly."
>
> "Section 65-4-20. Careless Use of Firearms. Whoever intentionally, and without malice, points or aims any firearm at or toward any person, or discharges any firearm at or toward any person or object without knowing the identity of such object and thereby maims or injures any human being, shall be guilty of the careless use of firearms, and, upon conviction, shall be fined not more than one thousand dollars, or imprisoned, not more than one year, or both so fined and imprisoned, and if death ensue from such maiming or injuring the person discharging such firearm may, in the discretion of the prosecuting officer or grand jury, be charged with the crime of manslaughter. This section shall not extend to any case where firearms are used in self defense or in the discharge of official duty or in case of justifiable homicide."

In the case at bar Cotham used his gun carelessly. He intentionally and without malice pointed the gun toward the general direction of Stepp and discharged the gun. The firearm was not used in self defense, was not used in the discharge of official duty, and its use was not justifiable.

In *Somerset Seafood Co.* v. *U. S.*, 4th Cir., 193 F. (2d) 631, the Government contended that the claim fell within 28 U.S.C.A. see 2680(a), an exception to The Federal Tort

Claims Act. Judge Dobie, at p. 634, expressed the following significant thought:

> "The Act must be given a liberal construction to ward off the obvious evil which the Act was passed to prevent—the cumbersome and unwieldly practice of seeking relief in Congress by private bills. The jurisdiction granted to the Federal District Courts by Sec. 1346(b) of the Act is couched in quite broad and very expansive language."

And at p. 635, Judge Dobie said:

> "In addition to this, we think that, even if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in marking after the discretion has been exercised and the decision to mark has been made."

In the case at bar the Government, without a doubt, failed to use reasonable care in instructing the sentry when to use his gun. The Government armed the sentry with a 45-caliber gun. The Government ordered the sentry to stop those who carried liquor by the sentry hut and to require proper identification. The Government should have foreseen that an occasion might arise where the sentry would resort to his gun to carry out his orders. Yet, the Government negligently and carelessly left it up to the discretion of the sentry as to when he might use his gun. The Government instructed the sentry to use his gun when "necessity" arose. The Government never specified, never defined, what "necessity" was.

In addition, the Government failed to use reasonable care in the selection of the sentry. The Government armed a 17

year old boy with a 45-caliber gun. The sentry's experience with a 45-caliber gun was extremely limited. His practice on the firing range, part of his training, was confined to two or three times. It was foreseeable on the part of the Government that the sentry, armed with a gun, would at some time use the gun while on duty as a sentry. He was a poor shot with the gun, and the Government could have ascertained that he was a poor shot with the gun.

In *Nakat Packing Corporation* v. *U. S.*, 13 Alaska Reports 710; 105 F. Supp. 811 (D. Alaska 1st D.), the Government was held liable for damage to property caused by a fire. The Court found the Government negligent in nine particulars, two of which being the failure of the Government to instruct the operator in the care of gasoline generating units and the assignment by the Government of the operation, servicing and maintenance of machinery to an inexperienced person lacking any knowledge of the proper care of such machinery.

The sentry failed to use reasonable care to avoid killing Stepp. He had a front and rear sight on the gun. He did not take care to align Stepp in the sights and to insure missing Stepp when the gun fired. He did not aim the gun. By firing in the general direction of Stepp from a distance of 45 feet, the maximum effective range of the 45-caliber gun, while on the run, the sentry was not just negligent; he was grossly negligent.

Then, again, the sentry, when he elected to fire the gun, was negligent. He owed a duty not to kill Stepp. He was rapidly gaining upon Stepp. He had narrowed the distance separating him and Stepp from 300 feet to 45 feet. Stepp had no weapon upon him and had displayed no hostility towards the sentry. The sentry had upon him a night stick with which to overcome Stepp, if Stepp showed any resistance. There was no need to shoot.

POINT II

The decision below is in conflict with the decision of the United States District Court for the Northern District of California, Southern Division, in *Cerri* v. *United States,* 80 F. Supp. 831, holding the government liable for injuries resulting from shots fired by a sentry while attempting to halt a civilian.

In *Cerri* v. *United States,* 80 F. Supp. 831 (N. D. Calif., S. D.) a bystander was injured as a result of a shot fired by a soldier on guard duty while attempting to halt a civilian under arrest. At p. 832, the Court said:

> "At the most, the civilian trespasser was guilty of a misdemeanor. Since local law determines the question of negligence, *State of Maryland to Use of Burkhardt* v. *United States,* 4 Cir., 165 F. 2d 869, and since the California courts have consistently held that shooting is not justified to arrest, or to prevent the arrest of a person who has committed a misdemeanor, Alexander's conduct was negligence per se. *People* v. *Wilson,* 36 Cal. App. 589, 172 P. 1116; *People* v. *Lathrop,* 49 Cal. App. 63, 192 P. 722."

At p. 833 the court continued:

> "The statute itself creates the existence of employer to employee in the instance of a soldier in the United States Army. Effective regulations of the United States Army provide for the arrest of civilians by members of the guard or military police, 3 Fed. Reg., 1 Army War Dept., 586, within the limits of military jurisdiction . . . Under such orders, the soldier had the right to exclude trespassers and to use all force necessary to do so. The soldier was acting under guard orders

and regulations to protect all government property in view and to arrest all persons causing disorders on or near his post of duty, and to turn such persons over to the guard. The fact that in so doing he used greater force than necessary and so became guilty of negligence would not place his acts outside the scope of his employment.

"Pfc. Alexander's negligence while acting within the scope of his employment was the proximate cause of plaintiff, Edith M. Cerri's injuries and she is entitled to recover as against defendant.

"At said time, in an effort to prevent the escape of said civilian, said Robert E. Alexander negligently and carelessly fired a shot from his said .45 caliber automatic pistol directly towards plaintiff and the other people standing in front of said Grotto, and negligently caused said bullet to strike plaintiff, Edith M. Cerri, in the head, and she sustained personal injuries as a result thereof. The negligence of said Robert E. Alexander consisted in his unlawful act of shooting his pistol at said civilian to prevent his escape, when the civilian was guilty at most of the crime of assault and battery, a misdemeanor; in his failure to exercise reasonable care for the protection of the crowd of people in front of said Grotto No. 9, whom he knew, or by the exercise of reasonable care should have reasonably expected to be there, by shooting his pistol directly towards them; and in his act of shooting his pistol without using reasonable care to see that the bullet did not strike plaintiff, Edith M. Cerri, an innocent bystander, who was only a few feet from the automobile in which the civilian was fleeing at the time the shot was fired. Each of said acts of negli-

gence was a direct and proximate cause of the injury to plaintiff . . ."

The court at 80 F. Supp. 831, 837, dismissed the Government's defense of assault and battery, as follows:

> "The claims of the plaintiffs set forth in their complaint arose out of negligence, and are not excepted from the provisions of the Federal Tort Claims Act by the provisions of Sec. 943(h) of the Federal Tort Claims Act, 28 U.S.C.A. Sec. 943(h) (Now 28 U.S.C.A. Sec. 2680(h)) or by the provisions of any other subdivision of said Sec. 943."

The Court of Appeals for the Fourth Circuit in its decision below commented as follows on *Cerri* v. *United States, supra*:

> "Appellant relies heavily upon *Cerri* v. *United States,* 80 Fed. Supp. 831 (N. D., Calif., S. D.,) to sustain his contention that Cotham's act was negligence rather than assault and battery. In that case an innocent bystander was injured as a result of a shot fired by a soldier on guard duty while attempting to halt a civilian under arrest. Without giving our approval to that decision, in which consideration seems not to have been given the doctrine of transferred intent in assault and battery (A.L.I. Restatement of Torts Sec. 20(2)) or that the crime of assault and battery is committed by negligently firing into a crowd, we note the distinction that in that case there was no intention of hitting anyone whereas here the District Judge found that Cotham fired at Stepp for the purpose of hitting him."

POINT III

The decision below is in conflict with the decision of the Seventh Circuit in *Stewart* v. *United States,* 7th Cir., 199 F. 2d, 517, holding that an exception to the Federal Tort Claims Act is available to the Government only when aptly pleaded and proven, and can be waived by the Government.

The Government waited from June 29, 1950, the date its answer was filed, to February 6, 1953, before filing an Amended Answer, setting forth the affirmative defense of assault and battery as a bar to the claim. On March 28, 1952, the Government took the deposition of Donald E. Cotham, the sentry who shot Stepp. The deposition of Cotham was the only evidence presented by the Government. The Government possessed all of the facts leading up to the shooting of Stepp for almost eleven months prior to trial. Yet, the Government did not move the trial court for leave to file an amended answer until the day following the trial.

At the trial, February 5, 1953, when the trial court was hearing oral argument after all of the evidence had been introduced, counsel for plaintiff objected to the argument of the Special U. S. Attorney as to assault and battery. Counsel for plaintiff based his objection on the Federal Rules of Civil Procedure and the case of *Stewart* v. *U. S.,* 7th Cir., 199 F. (2d) 517.

Rule 8 (c) requires a party to set forth all affirmative defenses.

Rule 12 (h) states that a party waives all defenses and objections which he does not present either by motion or in his answer.

In *Stewart* v. *U. S.,* 7th Cir., 199 F (2d) 517, the trial court rendered summary judgment in favor of the Government. The Court of Appeals reversed the judgment and re-

manded the case to assess damages. The Government petitioned the Supreme Court of the United States for certiorari which was denied. The Government then moved the trial court to amend its answer, setting forth an exception under the Federal Tort Claims Act, 28 U.S.C.A., Sec. 2680(a). The motion was granted. The trial court entered judgment for the plaintiff. The Court of Appeals affirmed the judgment, and on the issue whether the Government waived the defense of an exception to the Act, said at p. 519:

> ". . . . In our view, Sec. 1346(b) conferred general jurisdiction of the subject matter of claims coming within its purview, and the exceptions referred to are available to the government as a defense only when aptly pleaded and proven. If this view be correct, we discern no reason why the Government the same as any other party-defendant should not be held to have waived the defense. Rule 12(h), Federal Rules of Civil Procedure, 28 U.S.C. It also must be admitted that the view which we take as to the time and manner of raising this socalled jurisdictional defense finds little direct support in the authorities. The single case is that of *Boyce* v. *United States*, D. C., 93 F. Supp. 866. There, the court stated, 93 F. Supp. at page 868: " 'Unless the pleadings show upon their face the applicability of the 'discretionary function' exception contained in Section 2680 (a), supra, the same must be raised by way of an affirmative defense and the burden, therefore, devolves upon the Government to establish its applicability.' "

And at p. 520, the court said:

> "The position which the government urges upon us is inimical to all reason, logic and common sense. Its

acceptance would lead to incongruities which should be avoided if possible. Finality in litigation could never be certain. It would always be dependent upon action by the government taken today, next month, next year or ten years from now, either by direct or collateral attack. And projecting the thesis to an extreme conclusion, we suppose that even after the judgment had been satisfied the government could sue and recover for monies paid under a void judgment. Another incongruity would arise relative to the allegations of a complaint essential to give the court jurisdiction of the subject matter under 1346(b). It is a universal rule, so far as we are aware, that a party who invokes the jurisdiction of a federal court must allege all facts necessary to give the court jurisdiction of the subject matter.

If the government's position were sustained, it would require a plaintiff in his complaint, in order to show jurisdiction, to negative all the provisions of Chapt. 171. Under Sec. 2680 of this chapter, not to mention the other provisions, thirteen exceptions from (a) to (m), inclusive, are enumerated and the necessity for negativing such exceptions in the complaint would impose upon the plaintiff the burden of proving such negative averments. Such a result would border on the preposterous. In contrast, the view we take of the situation does not require that the provisions of Chap. 171 be negatived in a complaint in order to confer general jurisdiction. If the government desires to rely upon any of such provisions it has a right to do so in defense of the action, providing such defense is aptly pleaded and proven."

"It is our conclusion and we so hold that the court properly rejected the defense invoked by the govern-

ment in its amended answer and that there was no error in striking the testimony in support thereof. In fact, the court might well have refused to hear such testimony."

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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Federal Tort Claims Act (Title IV of the Legislative Reorganization Act of 1946), 60 Stat. 842, 28 U.S.C. 921, *et seq.* repealed by Act of June 25, 1948, 62 Stat. 869, 992, and reenacted by repealing Act as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671-2680:
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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 554

WILLIAM V. STEPP, SR., ADMINISTRATOR OF THE ESTATE OF WILLIAM V. STEPP, JR., DECEASED, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia (R. 20-28) is not reported. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 41-45) is reported at 207 F. 2d 909.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1953 (R. 45). The petition for a writ of certiorari was filed on January 29, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a claim asserted under the Tort Claims Act, based upon the intentional shooting of a trespasser upon Government property by an Army sentry, is barred by the provisions of 28 U.S.C. 2680(h), which excepts from the coverage of that Act claims arising out of "assault, [and] battery".

2. Whether the District Court abused its discretion in granting the Government's motion to amend its answer to assert the defense of 28 U.S.C. 2680(h).

STATUTES AND RULES INVOLVED

1. The pertinent provisions of the Federal Tort Claims Act[1] are as follows:

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[1] The Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. (1946 ed.) 921, *et seq.* Title IV of that Act was repealed by the Act of June 25, 1948, 62 Stat. 869, 992. Its provisions were reenacted into law without material change by the repealing Act as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671-2680.

28 U.S.C. 2680.

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * * * * * *

(h) Any claim arising out of assault, battery * * *

* * * * * * * *

2. The pertinent provisions of Rule 15 of the Federal Rules of Civil Procedure are as follows:

(a) Amendments.

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

* * * * * * * *

STATEMENT

This action was brought under the Federal Tort Claims Act to recover damages for the death, on June 4, 1948, of petitioner's son William V. Stepp, Jr. The complaint alleged that the decedent was negligently shot and killed by Private Donald E.

Cotham, an Army sentry assigned to guard the entrance to the military reservation at Anchorage, Alaska (R. 30-33). The Government's original answer denied the allegation in respect to negligence (R. 33-35). At the trial, the sole evidence introduced on the question of liability was the deposition of Private Cotham. Its contents were summarized by the District Court in its opinion (R. 22-24) substantially as follows:

On June 3, 1948, Private Cotham was assigned to guard duty at the check point affording control over entry to the Army dock area at Anchorage (R. 22). Prior to assuming his post at 10 p.m., Cotham was instructed by his superiors to enforce rigidly the standing order to the effect that no person in possession of liquor was to be allowed access to the docks (R. 22). At approximately 2 a.m. on the following morning, the decedent, William V. Stepp, Jr., approached the check point and was challenged by Cotham who, in accordance with instructions, asked for identification (R. 2). Decedent stated that he was a seaman on an LST at anchor in the port but refused to produce formal identification in the form of a Coast Guard or Seattle dock pass (R. 2, 3). Cotham renewed his request and inquired also as to the contents of a package that decedent had in his possession. Decedent answered that the package contained nothing but laundry and that he intended to proceed to his ship (R. 3). Cotham

once more asked for identification, indicating that a pass had to be produced before any person could proceed through the check point (R. 3).

At this juncture, the telephone in the guard shack rang and Cotham entered the building to answer it. Shortly thereafter, hearing footsteps, he returned outside to discover decedent running in the direction of the docks at a distance of approximately 100 yards (R. 3, 9). Cotham pursued him on foot, and, on at least four separate occasions, shouted to him to "halt" (R. 3). Decedent ignored these commands and finally Cotham fired two shots at the ground and then two shots in the general direction of the legs of the decedent, who was then about 15 yards in front of him (R. 3, 10-12). Decedent fell to the ground and shortly thereafter was declared dead by a medical officer.

The day following the trial, the Government filed a motion for leave to amend its answer to assert the affirmative defense that the District Court was without jurisdiction to hear the cause, in that petitioner's claim arose out of an assault and battery within the meaning of 28 U.S.C. 2680(h) (R. 33-37). After a hearing on the motion, the District Court took the matter under advisement. On February 20, 1953 the court indicated that it would permit the Government to amend the answer and offered petitioner the opportunity to introduce further evidence on the

new defense (R. 21). Petitioner did not avail himself of this opportunity, electing instead to have the court dispose of the case on the pleadings and the evidence already presented (R. 21, 22). In its opinion (R. 20-28), the District Court found that Cotham had fired the last two shots "for the purpose of hitting [decedent]" and that an assault and battery had been committed, and then ruled that the claim was barred by 28 U.S.C. 2680(h) (R. 28). Hence, it dismissed the action for want of jurisdiction (R. 1). On appeal, the Court of Appeals affirmed (R. 41-46).

ARGUMENT

28 U.S.C. 2680(h) (p. 3, *supra*) excludes claims based upon "assault, battery * * *" from the coverage of the Tort Claims Act. Assuming that the shooting of decedent by the Army sentry was wrongful at all, the undisputed facts of the case make it plain that the courts below correctly determined that the instant claim comes within this exception. And it is equally clear that, as the Court of Appeals held, the District Court did not abuse its discretion under F.R.C.P. 15 (pp. 3-4, *supra*) in permitting the Government to amend its answer, after trial but before judgment, to assert the defense of Section 2680(h). Accordingly, further review by this Court is not warranted.

1. Petitioner's complaint in the District Court was grounded exclusively on the theory that the sentry negligently shot decedent.[2] As the District Court's unchallenged findings show, however, the fatal shots were intentionally fired at decedent with the purpose of hitting him. If, in the circumstances of the case, this drastic action was not warranted as a last resort, it thus amounted, under long standing principles of tort law applied by the courts below, to an assault and battery.

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[2] In the Court of Appeals petitioner alleged for the first time that Cotham's superiors were negligent in failing to exercise reasonable care in the selection of a sentry and in failing to give detailed instructions to Cotham regarding the occasions on which he was to resort to his weapon. These contentions not having been raised in the District Court, the court below quite properly did not consider them. *Thomas* v. *Taylor*, 224 U. S. 73, 84; *Barnsdall Refining Corp.* v. *Cushman-Wilson Oil Co.*, 97 F. 2d 481, 485 (C.A. 8); *Brockenbrough* v. *Champion Fibre Co.*, 176 Fed. 840, 842 (C.A. 4). In any event, they are totally without substance. Aside from the inescapable fact that the claim would still be one arising out of an assault and battery, there is nothing in the record to indicate that Cotham was not as fully qualified to perform the duties to which he was assigned as other available enlisted personnel. Moreover, assuming the truth of the soldier's self serving declaration that he was told nothing more than to fire in cases of necessity, there was no showing that the absence of further instructions was the proximate cause of the accident. The circumstances confronting Cotham after his warning shots had been ignored were peculiarly ones calling for the exercise of judgment by the person on the scene. Thus no matter what instructions had been given him, short of a direct order never to shoot at an interloper, he would have had to rely, as he did, upon his own analysis of the occasion.

An assault is "an act other than the mere speaking of words which, directly or indirectly, is a legal cause of putting another in apprehension of an immediate and harmful or offensive contact * * * if the actor *intends* to inflict a harmful or offensive contact upon the other or a third person or to put the other or a third person in apprehension thereof". *Restatement of Torts,* § 21. (Emphasis supplied). If physical contact results from the assault, the defendant has committed the additional tort of battery. *Ibid,* §§ 13, 18. And it is this intentional aspect that sharply differentiates assaults and batteries from negligence. The very essence of the latter is that although the defendant did not intend to harm the plaintiff, or place him in immediate fear of harm, a reasonable man in his position should have anticipated that injury might flow from his conduct and guarded against it. See Prosser *on Torts,* p. 176.

This distinction is at the foundation of the universally accepted rule that the employment of excessive force by a peace officer in the commission of a lawful act constitutes an assault and, if physical harm results, a battery as well. See *e.g. Stoehr* v. *Payne,* 132 La. 213, 61 So. 206; *Gosczinski* v. *Carlson,* 157 Wis. 551, 147 N.W. 1018; *Brown* v. *Wyman,* 224 Mich. 360, 195 N.W. 52; *Sossamon* v. *Cruse,* 133 N.C. 470, 45 S.E. 757; *Jennings* v. *Riddle,* 20 Tenn. App. 89, 95 S.W. 2d

946; *Grau* v. *Forge,* 183 Ky. 521, 209 S.W. 369; *Davidson* v. *Allam,* 143 Va. 367, 130 S.E. 245; *Boyes* v. *Evans,* 14 Cal. App. 2d 472, 58 P. 2d 922. It follows from the fact that the force is applied deliberately, generally with the purpose of frightening or injuring the wrongdoer into submission, that any damages flowing therefrom are not the consequence of negligence.

As in the court below, however, petitioner places reliance here on the Alaska criminal statutes, which denominate assault with a dangerous weapon in precisely those terms and limit the offenses of "assault" and "assault and battery" to instances where no dangerous weapon is employed (Pet. pp. 11-12). See Alaska Comp. Laws Ann. (1949) §§ 65-4-22, 65-4-23. Quite apart from the fact that these statutes hardly provide a basis for assuming that Alaska would reject the well established line of demarcation between intentional and unintentional torts, this reliance is wholly misplaced. "Assault with a dangerous weapon" is, as the court below observed, merely "one species under the genus, assault" (R. 44). Moreover, there is nothing in the Tort Claims Act to indicate that Congress intended the scope of the Section 2680(h) exception to vary from jurisdiction to jurisdiction in accordance with the particular terminology employed to describe what is commonly regarded as an assault and battery. On the contrary, the legislative

history of the Section dispels any possible doubt that the Congressional purpose was to exclude from the coverage of the Act, irrespective of label, *deliberate* torts involving personal injury. See *e.g.* S. Rep. No. 1400, 79th Cong. 2nd Sess. p. 33; H. Rep. No. 1287, 79th Cong. 1st Sess. p. 6; Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong. 3rd Sess. p. 39; Hearings before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong. 2nd Sess. pp. 33, 34.

Nor can petitioner derive any comfort from *Cerri* v. *United States,* 80 F. Supp. 831 (N.D. Cal.). In that case, an Army guard fired into a crowd in an attempt to apprehend an escaping civilian trespasser and, by accident, hit an innocent bystander instead. The court determined that the victim's claim was one based on negligence —that negligence being primarily the act of shooting into the crowd—and that as a consequence Section 2680(h) did not act as a bar. While the court did not discuss the elements of assault and battery, and apparently failed to give consideration to the "transferred intent" doctrine (see *Restatement of Torts,* §20(2); Prosser *on Torts,* pp. 47-48), it is clear that the decision does not cover the situation in which a shot is fired into an isolated area at a specific individual and that individual rather than a third person is in fact killed or injured. Cf. *Lewis* v. *United States,* 194

F. 2d 689 (C.A. 3); *United States* v. *Hambleton*, 185 F. 2d 564 (C.A. 9).[3]

2. Petitioner attacks the additional determination of the court below that the District Court did not err in permitting the Government to amend its answer after trial to assert the defense of the Section 2680(h) exception. His contention is that this determination conflicts with the decision of the Seventh Circuit in *Stewart* v. *United States*, 199 F. 2d 517. The *Stewart* case, however, involved an entirely different question. There, the Government did not raise the Section 2680(a) exception until after a judgment in favor of the

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[3] The instant case presents a fact situation almost identical to that in the *Lewis* case. There, a Marine sentry stationed at the entrance to a naval supply depot shot a civilian who was attempting to leave the depot after having been instructed to wait. The district court ruled that the civilian's suit under the Tort Claims Act, which had been brought on a theory of negligence, was barred by Section 2680(h). The Third Circuit, in affirming, held that since the district court had found that the sentry had used excessive force, that finding being supported by the evidence, its conclusion that he had committed an assault and battery within the meaning of Section 2680(h) was correct.

In the *Hambleton* case, the suit was based upon allegedly excessive interrogation of a civilian by an Army criminal investigator. The Ninth Circuit held *inter alia*, in reversing a judgment against the United States, that, if the acts of the investigator upon which the complaint was grounded were done willfully and intentionally, they constituted an an assault within the meaning of Section 2680(h). The court observed that (185 F. 2d at 566): "[By virtue of Section 2860(h)] most intentional torts are excepted from the Act."

United States had been reversed and the cause remanded with instructions to assess damages. The District Court refused to hear evidence relating to the applicability of the exception and entered judgment against the United States. On appeal, the Government urged that this was error because the Section 2680 exceptions go to the jurisdiction of the court to enter judgment at any time. The Seventh Circuit rejected this contention and affirmed the judgment.

While it is doubtful that *Stewart* was correctly decided, the question whether the Government can in any circumstances waive a defense grounded upon Section 2680 obviously has no bearing upon the discretion to allow amendments to pleadings, even after judgment, which is granted to district courts by F.R.C.P. 15 (pp. 3-4 *supra*). And it is uniformly accepted that the exercise of that discretion is not, in the absence of abuse, reviewable on appeal. See *e.g. Canister Co.* v. *Leahy*, 191 F. 2d 255, 257 (C.A. 3), certiorari denied, 342 U.S. 893; *Hall* v. *Gordon*, 128 F. 2d 461, 462 (C.A.D.C.); *Aetna Casualty & Surety Co.* v. *Abbott*, 130 F. 2d 40, 44 (C.A. 4); *Liverpool & London & Globe Ins. Co.* v. *Nebraska Storage Warehouses*, 96 F. 2d 30, 37 (C.A. 8); *Maryland Casualty Co.* v. *Hosmer*, 93 F. 2d 365, 366 (C.A. 1). As the court below held, there was no abuse here. The amendment was offered to conform the pleadings to the proof. F.R.C.P. 15(b). Petitioner has not and clearly

cannot point to any way in which he has been prejudiced by its allowance by the District Court.[4] On the contrary, he has restricted himself throughout the litigation to the meritless assertion that, by not raising the Section 2680(h) exception in its original answer, the Government waived it as a defense.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1954

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[4] As heretofore noted (pp. 6, 7, *supra*), the District Court was careful to afford petitioner an opportunity to introduce evidence on the defense contained in the amended answer. Petitioner elected not to avail himself of this opportunity. Further, the amendment was offered on the basis of nothing more than the Cotham deposition. Since petitioner was represented at its taking, and therefore knew long before trial that the sentry had intentionally shot at decedent, he could hardly claim that he was unfairly surprised.

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